

LAW OFFICES

SHOOK, HARDY & BACON

REPORT ON RECENT ETS
AND IAQ DEVELOPMENTS

April 1, 1994

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REPORT ON RECENT ETS AND IAQ DEVELOPMENTS

IN THE UNITED STATES

REGULATORY AND LEGISLATIVE MATTERS

U.S. OCCUPATIONAL SAFETY AND HEALTH ADMINISTRATION (OSHA)

[1] Special Report: OSHA's Proposed Rulemaking on Indoor Air Quality and Indoor Smoking

The Department of Labor announced on Friday, March 25, 1994, that OSHA has decided to initiate a combined rulemaking on indoor air quality and indoor smoking. The proposed rule, which would apply to some six million workplaces including bars and restaurants, would require employers in every industrial and nonindustrial worksite in the United States to ban smoking indoors or restrict smoking to a separate room with outside exhaust and negative pressure. In addition, no employee could be compelled to enter a designated smoking room in the performance of normal work activities. The proposed rule would address IAQ problems in nonindustrial worksites by (i) requiring the implementation of IAQ compliance plans that would ensure the proper operation and maintenance of ventilation systems in order to control indoor air contaminants, (ii) establishing IAQ procedures during renovation and remodeling, (iii) requiring the implementation of measures relating to indoor air contaminants, (iv) requiring employee information and training, and (v) requiring an employee complaint procedure. OSHA maintains that the proposed rule "would not require all building owners to install new ventilation systems."

The public has been invited to comment on the proposed standard. Comments must be postmarked within 90 days from the date the proposed standard is published in the *Federal Register*; publication is expected to occur during the week of April 4. Informal public hearings on the proposed standard are currently scheduled for July 12 through 26, 1994. Those who

The indoor smoking provisions of the proposed rule provide as follows:

Tobacco smoke.

- (i) In workplaces where the smoking of tobacco products is not prohibited, the employer shall establish designated smoking areas and permit smoking only in such areas;
- (ii) The employer shall assure that designated smoking areas are enclosed and exhausted directly to the outside, and are maintained under negative pressure (with respect to surrounding spaces) sufficient to contain tobacco smoke within the designated area;
- (iii) The employer shall assure that cleaning and maintenance work in designated smoking areas is conducted only when no smoking is taking place;
- (iv) The employer shall assure that employees are not required to enter designated smoking areas in the performance of normal work activities;
- (v) The employer shall post signs clearly indicating areas that are designated smoking areas; and
- (vi) The employer shall post signs that will clearly inform anyone entering the workplace that smoking is restricted to designated areas.
- (vii) The employer shall prohibit smoking within designated smoking areas during any period that the exhaust ventilation system servicing that area is not properly operating.

intend to appear at the hearings must send a notice to OSHA; the postmark deadline for such notices is 75 days from the date of publication. (More information about submitting comments and notices to appear can be found below.) According to the Assistant Secretary of Labor, a final rule may be years away.

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The rulemaking was announced during a press briefing conducted by Robert Reich, the U.S. Secretary of Labor, and Joseph Dear, Assistant Secretary of Labor in charge of OSHA. "The decision to propose a strong set of standards to remedy this hazard was not taken lightly," according to Reich. "Soon after this administration arrived in Washington, we commenced an analysis of all of the research to date linking poor air quality at the workplace to serious illnesses and deaths among American workers, including heart disease, upper respiratory illnesses and disease, and cancer. After many months of analysis, it is clear that there is sufficient evidence to commence this rulemaking proceeding." Noting that his own Department does not comply with the proposed rule, Reich said he would require the Department of Labor to begin immediately to develop a plan to provide "all employees with a smoke-free workplace in all Department facilities in accordance with our proposal."

Dear claimed that the proposed rulemaking "will protect America's working men and women from heart disease, lung cancer, pulmonary tract infections, and countless other diseases and illnesses all linked to poor indoor air quality and environmental tobacco smoke." In response to questions, Dear stated that the rule would be "self-enforcing" with respect to ETS. "Twenty-five percent of the nation's employers already have restriction on smoking," he said. "There are a lot of public facilities where smoking is already restricted. And it seems to work without any outside enforcement activity."

Mixed-Use or Multi-Employer Buildings

When asked whether the smoking restrictions would apply to mixed-use buildings, Dear said OSHA only had jurisdiction over employers and workplaces, implying that residential areas in buildings housing offices would not be affected. With respect to all multi-employer worksites, OSHA maintains that it has a long history of enforcing OSHA standards in them. See *Anning-Johnson*, 4 OSH Cas. (BNA) 1193; *Harvey Workover, Inc.*, 7 OSH Cas. (BNA) 1687; OSHA Field Operations Manual (CL 2.45 CH-1, Chapter V-9). As a general matter OSHA regards each employer as being responsible for the health and safety of his or her own employees. However, under certain circumstances an employer may be cited for endangering the safety or health of another employer's employees. In determining who to hold responsible, OSHA states that it will

look at who created the hazard, who controlled the hazard, and whether all reasonable means were taken to deal with the hazard. It is contemplated by OSHA that in those cases where there is a multi-employer worksite covered by the proposed rule, the affected employers will divide up the responsibilities in the manner in which they make the most sense. Those who have information at their disposal that is required to be kept under the proposal will make use of the information or make it available to whoever needs that information in the discharge of his or her duties.

Restaurants, Bars and Hotels

As currently drafted, the proposed rulemaking would make no exemption for restaurants and bars. OSHA's proposed rule purports (i) to treat restaurants and bars as workplaces covered by the proposed rule, (ii) to require separate, enclosed smoking areas for all restaurants and bars that wish to permit indoor smoking, and (iii) to prohibit employers from compelling employees (such as waiters and waitresses) from entering the smoking areas as a part of their regular employment. In this regard, OSHA Director Dear said, "The intention is to protect workers from the health effects of poor indoor air and environmental tobacco smoke. The requirement is, with respect to smoking, that if it is permitted it has to be in a separate room with negative pressure that's exhausted to the outside. That requirement means that employees could not be compelled to work or serve in those rooms." When asked if this would amount to a "flat ban on smoking in restaurants," Dear replied, "As the rule is proposed, that would be the effect."

Hotels also would be covered by the proposed rule. Dear stated in the press conference that smoking could not occur in hotel rooms when hotel employees were present. There was no clarification as to whether OSHA would require "smoking hotel rooms" to be separately exhausted.

General Application

Fielding a question regarding the purported seriousness of the threat posed by ETS in light of the EPA Risk Assessment on ETS, Labor Secretary Reich said, "We based the decision to move forward with a rule on many studies including the EPA study to which you referred. . . . The studies convinced us, convinced me, convinced the assistant secretary, that we had very

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strong reason to believe that the health risks substantially outweighed whatever burden might be imposed upon American business."

When Dear was asked to predict what the reaction to the proposed rule would be, he referred to the Request for Information on indoor air quality (RFI) made by OSHA in 1991. Noting that the RFI generated more than 1,200 comments, Dear said, "those comments span the gamut from opposition to this action to full support."

According to Dear, the costs associated with implementing the proposed rule on indoor air quality and indoor smoking include a one-time first-year cost of \$1.5 billion in addition to \$6.6 billion in expenditures on an annual basis. On the other side of the ledger, OSHA has estimated that the measure would result annually in \$15 billion in benefits to American business. Reich claimed the benefits will come from an increase in worker productivity. Reich also noted that the proposal was cleared after a preliminary cost analysis by the Office of Management and Budget.

Solicitor of Labor Tom Williams stressed during the press conference that the proposed rule may be changed in response to public comments OSHA receives. Dear did not rule out the possibility that some worksites, such as restaurants and bars, may ultimately be exempted.

OSHA's schedule allows for the development of a second proposed rule and a second round of public hearings should revision of the rule become necessary in light of the comments received, Dear said. He estimated that after the period of public commentary a second proposal could be released late in 1994 or early in 1995. When pressed to predict the earliest that the rule as finalized would be effective, Dear suggested that it would be "a couple of years." Following the publication in the *Federal Register* of a final rule, affected parties can obtain judicial review in the U.S. Court of Appeals.

Hearings and Public Participation

Interested persons are requested by OSHA to submit written data, views and arguments concerning the proposed rule. Responses to the questions raised at various places in the proposal are particularly encouraged. As indicated above, these comments must be

postmarked 90 days after publication of this proposal in the *Federal Register*. Comments are to be submitted in quadruplicate, to: The Docket Office, Docket No. H-122, Room N-2625, U.S. Department of Labor, 200 Constitution Avenue, N.W., Washington, D.C. 20210, Telephone No. (202) 219-7894.

All written comments received within the comment period will be made a part of the rulemaking record and will be available for public inspection and copying at OSHA Docket Office.

- Notice of Intention to Appear at the Informal Hearing

Pursuant to section 6(b)(3) of the Occupational Safety and Health Act (OSH Act), an informal public hearing will be held on this proposal in Washington, D.C., from July 12 through July 26, 1994. If OSHA receives sufficient requests to participate in the hearing, the hearing period may be extended.

The hearing will commence at 9:30 a.m. in the auditorium of the Frances Perkins Building, U.S. Department of Labor, 3rd Street and Constitution Avenue, N.W., Washington, D.C. 20210.

Persons desiring to participate at the informal public hearing must file a notice of intention to appear by 75 days after date of publication in the *Federal Register*. The notice of intention to appear must contain the following information:

- The name, address, and telephone number of each person to appear;
- The capacity in which the person will appear;
- The approximate amount of time required for the presentation;
- The issues that will be addressed;
- A brief statement of the position that will be taken with respect to each issue, and
- Whether the party intends to submit documentary evidence and, if so, a brief summary of it.

The notice of intention to appear must be mailed to Mr. Thomas Hall, OSHA Division of Consumer Affairs, Docket No. H-122, U.S. Department of Labor, Room N-3647, 200 Constitution Avenue,

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N.W., Washington, D.C. 20210, Telephone No. (202) 219-8615. A notice of intention to appear also may be transmitted by facsimile to (202) 219-5986, by the same date provided the original and 3 copies are sent to the same address and postmarked no more than 3 days later.

- Filing of Testimony and Evidence Before the Hearing

Any party requesting more than ten minutes for presentation at the informal public hearing, or intending to submit documentary evidence, must provide in quadruplicate the testimony and evidence to be presented at the informal public hearing. One copy shall be unstapled and unbound and suitable for copying. These materials must be provided to Mr. Thomas Hall, OSHA Division of Consumer Affairs, at the address above and be postmarked no later than 90 days after date of publication in the *Federal Register*.

Each submission will be reviewed in light of the amount of time requested in the notice of intention to appear. In instances where the information contained in the submission does not justify the amount of time requested, a more appropriate amount of time will be allocated and the participant will be notified of that fact prior to the informal public hearing.

Any party who has not substantially complied with the above requirement may be limited to a ten-minute presentation and may be requested to return for questioning at a later time.

Any party who has not filed a notice of intention to appear may be allowed to testify for no more than ten minutes as time permits, at the discretion of the Administrative Law Judge, but will not be allowed to question witnesses.

Notice of intention to appear, testimony and evidence will be available for inspection and copying at the OSHA Docket Office at the address above.

- Conduct and Nature of Hearing

The hearing will commence at 9:30 a.m. on the first scheduled day. At that time, any procedural matters relating to the proceeding will be resolved.

The nature of an informal rulemaking hearing is established in the legislative history of section 6 of the OSH Act and is reflected by OSHA's rules of procedure for hearings (29 CFR 1911.15(a)). Although the presiding officer is an Administrative Law Judge and questioning by interested persons is allowed on issues, the proceeding is informal and legislative in type. OSHA's intent, presumably, is to provide interested persons with an opportunity to make oral presentations that can proceed expeditiously in the absence of procedural restraints, which could impede or protract the rulemaking process.

The hearing is an informational administrative proceeding rather than an adjudicative one. The rules of evidence will not apply. Because the regulations that govern hearings are presumably designed to try to ensure fairness and due process and also facilitate the development of a clear, accurate and complete record, questions of relevance, procedure and participation typically are decided to favor development of the record.

The hearing will be conducted in accordance with 29 CFR Part 1911. The Administrative Law Judge who presides over the hearing will make no decision or recommendation on the merits of OSHA's proposed rule. The Administrative Law Judge has the following powers to ensure that the hearing proceeds at a reasonable pace and in an orderly manner:

1. To regulate the course of the proceedings;
2. To dispose of procedural requests, objections and comparable matters;
3. To confine the presentations to the matters pertinent to the issues raised;
4. To regulate the conduct of those present at the hearing by appropriate means;
5. In the Judge's discretion, to question and permit the questioning of any witness and to limit the time for questioning; and
6. In the Judge's discretion, to keep the record open for a reasonable, stated time (known as the post-hearing comment period) to receive written information and additional data, views

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and arguments from any person who has participated in the oral proceedings.

If OSHA subsequently issues a revised rule, there may be an additional, second round of hearings.

The States

OSHA maintains that Section 18 of the OSH Act expresses Congress' intent to preempt state laws relating to issues on which Federal OSHA has promulgated occupational safety and health standards. Under the OSH Act, a state can avoid preemption if it submits, and obtains, Federal approval of a plan for the development of such standards and their enforcement. Therefore, states with occupational safety and health plans approved under Section 18 of the OSH Act will be able, according to OSHA, to develop their own state standards to deal with any special problems that might be encountered in a particular state.

The proposed Federal standard on indoor air quality and indoor smoking addresses hazards that are not unique to any one state or region of the country. OSHA has acknowledged that many state and local governments have enacted provisions addressing the presence of ETS and other indoor air quality issues. Section 18(a) of the OSH Act requires preemption only of state laws that qualify as occupational safety and health standards, not of state laws of general applicability. It is OSHA's stated intent that state laws consistent with this standard remain in effect to the maximum extent permitted.

As to the 25 states and territories with their own OSHA-approved occupational safety and health plans, OSHA asserts that all such states must adopt a comparable standard within six months of the publication date of a final standard. The 25 jurisdictions are: Alaska, Arizona, California, Connecticut (for public employees only), New York (for state and local government employees only), Hawaii, Indiana, Iowa, Kentucky, Maryland, Michigan, Minnesota, Nevada, New Mexico, North Carolina, Oregon, Puerto Rico, South Carolina, Tennessee, Utah, Vermont, Virginia, Virgin Islands, Washington, and Wyoming. In these 25 states, until such time as a state standard is promulgated, Federal OSHA apparently will provide interim enforcement assistance as appropriate.

Other Aspects of the Proposed Rule

- OSHA Director Dear confirmed that OSHA intends the proposed rule on indoor air quality and indoor smoking to cover small employers (with as few as several employees), although he indicated that self-employed individuals would be exempt.
- OSHA states that a finding of significant risk is supported by data submitted to the record "and other evidence," but it is not immediately clear what the other evidence is.
- The categories of relevant health effects produced by poor indoor air quality are, according to OSHA: irritation, pulmonary, cancer, reproductive, cardiovascular and "various system." OSHA also discusses all six disease endpoints as health effects attributable to nonsmoker exposure to ETS, although cardiovascular effects and lung cancer receive the most discussion.
- OSHA states that it concludes "that the relative risk of lung cancer in nonsmokers due to chronic exposure to ETS ranges between 1.20 and 1.50 and the relative risk for heart disease due to ETS exposure ranges between 1.24 and 3.00."
- OSHA also concludes that it is not limited to an examination of workplace data, and states that the "health effects observed and the risk estimates calculated from studies of the general population, or of selected subgroups, such as nonsmoking wives of smoking husbands, are relevant to the working nonsmoking population."

Reaction to OSHA's Proposal

ASH responded to OSHA's March 25 announcement by circulating a press release asserting that OSHA's action is directly attributable to ASH's pending lawsuit against OSHA. In the lawsuit, ASH seeks to force the initiation of a separate rulemaking on ETS. ASH claims that the workplace smoking policy "was developed to meet a court deadline that [OSHA] file a brief by Friday, March 18th, demonstrating that it did not unreasonably delay in acting on the issue of workplace smoking." A discussion of the brief filed by OSHA appears later in this Report.

According to ASH, "it is very pleased with OSHA's action, and believes that its law suit has been largely successful." ASH notes, however, that the lawsuit will

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not be dismissed. John Banzhaf, executive director of ASH, claims that he will use the lawsuit to press OSHA to move more quickly on the rulemaking and to seek a complete ban on smoking in the workplace. Banzhaf claims, "Scientific studies show that smoking even in separately-ventilated rooms poses a health risk to workers from the amount of smoke which nevertheless escapes which is higher than allowed with other chemicals."

Jim Dinegar, spokesperson for the Building Owners and Managers Association (BOMA) International, reportedly approved of the OSHA proposal on smoking, but plans to take issue with any building maintenance practices that will cost billions of dollars each year. BOMA has consistently taken an approach to IAQ issues that would involve controlling the sources of indoor air contaminants. Association members are, according to Dinegar, "reeling from the economy right now, and \$8 billion is a lot of money." BOMA president Thomas McChesney reportedly complained that "OSHA's regulatory proposal misses the mark by not going far enough to eliminate the origin of IAQ problems but, rather, goes to excessive lengths in proposing record keeping requirements."

According to a press report, the American College of Occupational and Environmental Medicine has also endorsed OSHA's proposed workplace smoking policy. A representative of that organization was quoted as saying, "Our physician members witness how environmental tobacco smoke (ETS) destroys people's lives and welcome the government's aggressive move to improve worker health." Scott Ballin of the American Heart Association reportedly said the organization is "very pleased that the Labor Department and OSHA have taken this initiative. It's clearly a major step."

Speaking against the proposal, Brennan Dawson of The Tobacco Institute (TI) was quoted in a press report as saying, "This is social engineering on a vast scale. Such massive intervention into the private lives of adults recalls the extremism of Prohibition." Dawson also said, "In order to regulate any substance, OSHA has an obligation to demonstrate a significant risk or hazard, and that has not been done with environmental tobacco smoke." TI's Thomas Lauria was quoted as saying, "OSHA cannot restrict smoking or any other substance without proof of harm that is derived from workplace studies."

Also criticizing the proposal was Wendy Webster of the National Restaurant Association, who reportedly

said that most of the organization's 550,000 members believe that decisions about smoking policies in bars and restaurants should be made by individual owners and their clientele. The senior director of the association said that many restaurant owners have blamed smoking bans for reducing income.

"Regulatory Text" Published in Support of Rulemaking

Some 300 pages of material preceding the actual proposed rule will appear in the *Federal Register* notice. In this material, OSHA reviews the comments received in response to its Request for Information on indoor air. OSHA cites the EPA Risk Assessment on ETS as providing support for OSHA's determination that ETS in the workplace must be regulated. OSHA further states that it has submitted its proposed standard to the EPA for review and comment.

OSHA specifically lists the following health effects as a result of ETS exposure: (i) eye and upper respiratory tract irritation; (ii) decreases in pulmonary function and the risk of developing COPD; (iii) cardiovascular effects including acute effects, such as exacerbation of angina, and chronic effects, such as atherosclerosis; (iv) reproductive effects, including low birth weight, miscarriage, and congenital abnormalities; and (v) cancer.

OSHA finds that heart disease and lung cancer "constitute the type of 'material impairment of health or functional capacity' which the Act seeks to reduce or eliminate." The agency estimates that "there will be approximately between 144 and 722 cases of lung cancer per year among nonsmoking American workers exposed to ETS in the workplace." The agency further estimates that "there will be between 2,094 and 13,000 deaths from heart disease per year among nonsmoking American workers exposed to ETS in the workplace."

The agency justifies not regulating ETS under its guidelines for the regulation of potential occupational carcinogens ("Cancer Policy") by claiming that the guideline procedures "may not allow for the level of public input and policy review that is appropriate for this rulemaking, involving many different types of health effects and a broad range of employers and workers."

OSHA cites a study conducted in 1987-88 in California called the "California Activity Pattern Study" to conclude that "the workplace is the location with the

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highest reported exposure to ETS in enclosed environments, and such exposure is on average nearly three times more prevalent at work than at home." OSHA also concludes that there is a sufficient database to support findings about concentrations of ETS in workplaces, and states, "Air exchange rates in nonindustrial workplaces are not designed to control the risks of ETS exposure."

In its preliminary risk assessment of ETS, OSHA has determined that "health effects observed and the risk estimates calculated from studies of the general population, or of selected subgroups, such as non-smoking wives of smoking husbands, are relevant to the working nonsmoking population." Based on a number of epidemiologic studies that OSHA finds to be reliable, OSHA concludes that for every 1,000 workers exposed to ETS at their workplace in the course of a 45-year working lifetime, "approximately 1 will most likely develop lung cancer and 7 to 16 will develop heart disease."

OSHA admits that data related to poor IAQ and health effects is not well developed, but estimates that "the lifetime excess burden for severe headaches experienced in air-conditioned office buildings is 57 per one thousand exposed employees and the lifetime risk for acute upper respiratory conditions is 85 per one thousand exposed employees." OSHA requests comment to provide more data about the health effects of poor IAQ and about specific levels of contaminants found indoors.

IAQ/ETS Issues Addressed by OSHA Since 1985

On at least five occasions prior to the announcement of a specific IAQ/ETS rulemaking, OSHA had denied requests by individuals and organizations to regulate smoking in the workplace. As recently as January 1992, former OSHA officials were quoted as saying that "research linking workplace environmental tobacco smoke to lung cancer and other health concerns is particularly lacking and would have to be addressed more thoroughly before the agency could support a more aggressive regulatory approach." ASH alone has filed four actions in court against OSHA challenging adverse agency decisions about ETS in the workplace. ASH's requests for relief have been denied in court three times; the fourth case is pending as of this writing.

The following chronology of events summarizes the involvement of OSHA with ETS and IAQ issues during the past decade.

1985 -- Petition filed with OSHA by Senator Garn for Mr. David Horne, et al., requesting a classification of tobacco smoke as a Category One Potential Occupational Carcinogen. OSHA denies petition.

1986 -- Petition filed with OSHA by Congressman David Monson for Mr. David Horne, requesting an emergency temporary standard governing ETS in the workplace.

1987 -- OSHA denies Monson petition. Public Citizen Health Research Group and the American Public Health Association petition OSHA for an emergency temporary standard to restrict smoking in workplaces to certain specified areas. OSHA denies the petition. ASH petitions OSHA for an emergency temporary standard to ban smoking in common workplace areas.

1988 -- OSHA requests an independent contractor to review the evidence on ETS exposure submitted by above petitioners. The evidence is criticized as being based primarily on residential exposure.

1989 -- ASH files complaint in U.S. District Court seeking an order to compel agency action on its 1987 petition. OSHA denies petition for emergency temporary standard. ASH dismisses its complaint and files a petition with the court of appeals for review of OSHA's determination not to issue an emergency temporary standard.

1990 -- ASH and OSHA agree to hold proceedings in abeyance until OSHA considers whether to take action on ETS. In November, OSHA states it is awaiting the release of a final EPA Risk Assessment on ETS. In December, OSHA declares its intent to issue a request for information on indoor air, including ETS, in the Spring of 1991.

1991 -- ASH files two new petitions for review with the court of appeals. In May, the court of appeals denies ASH's first petition to review OSHA's refusal to issue an emergency temporary standard. In September, OSHA issues its Request for Information on indoor air, including ETS.

1992 -- AFL-CIO and other unions petition OSHA to develop an IAQ standard based on a "building

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systems" approach. Court of appeals denies ASH's second and third petitions for review. In February, March and July, ASH files rulemaking petitions with OSHA seeking regulation of workplace smoking. In addition, ASH files in July a petition requesting that OSHA initiate a rulemaking under its Cancer Policy to ban smoking in all indoor workplaces or restrict smoking to separate areas with independent ventilation. In October, OSHA responds to this petition stating it is reviewing materials from the Request for Information and does not believe a separate rulemaking is necessary. In December, ASH files a fourth petition for review with court of appeals, seeking review of October letter.

1993 -- EPA issues its final Risk Assessment on ETS, and outgoing Secretary of Labor Lynn Martin issues memorandum to OSHA requesting the agency to commence rulemaking for ETS separate from IAQ "as soon as possible." In May, court of appeals denies OSHA's motion to dismiss ASH's petition for review filed in December 1992.

1994 -- ASH and OSHA file briefs with the court of appeals. Oral argument is scheduled for May 16. On March 25, OSHA announces proposed rulemaking on IAQ and smoking in the workplace.

Some of the information for this discussion came from *UPI* and *PR Newswire*, March 25, 1994; *The Guardian*, *Los Angeles Times* and *Newsday*, March 26, 1994; BNA's *Occupational Safety and Health Reporter*, *Special Report on OSHA*, January 8, 1992.

REFERENCE MATERIALS

The following materials are attached to this Report:

- Appendix C Transcript of OSHA Press Conference
- Appendix D Text of the Proposed Rule
- Appendix E ASH Press Release

In addition, this Report is accompanied by a reference document on OSHA that includes the materials which have been submitted by OSHA for publication in the *Federal Register* and a survey of OSHA's activities regarding ETS during the past decade.

[2] *ASH v. OSHA*: OSHA Files Brief; ASH Seeks Extension to File Reply Brief

Although its deadline was March 18, 1994, OSHA filed its brief opposing ASH's pending petition for

review on March 21. ASH's reply brief and both sides' final briefs are still expected to be filed. At this time, oral argument remains scheduled for May 16, 1994.

In its brief filed March 21, OSHA claims that its Cancer Policy "does not require the immediate initiation of rulemaking on any particular alleged carcinogen, and it does not prohibit OSHA from regulating a carcinogen in the same rulemaking proceeding as other noncarcinogenic hazards." OSHA further claims that there is no basis for ASH's claim that OSHA has unreasonably delayed initiating a rulemaking addressing ETS.

According to OSHA, "The subject matter of the proceeding is highly controversial and the Secretary has properly chosen to consider carefully all regulatory options and the extensive body of information already submitted to the agency." OSHA also avers that it has taken "concrete administrative actions" to complete a rulemaking on ETS, and thus, ASH's claims of delay are moot. At the time OSHA filed its brief, it had submitted its combined ETS/LAQ rulemaking proposal to the Office of Management and Budget for a cost analysis.

OSHA also cites an earlier court decision that rejected ASH's claim of unreasonable delay in which the court states, "This order is without prejudice to renewal of petitioner's request in the event that OSHA unreasonably delays resolution of this matter following receipt of comments [in response to its Request for Information on indoor air and ETS]." OSHA observes that the comment period for the Request for Information closed on March 21, 1992, and argues that this must be the beginning date for the calculation of any alleged period of delay.

"The response to the RFI was overwhelming," claims OSHA. "OSHA received over 1200 comments, exceeding 17,000 pages of materials, including a number of complex technical submissions by the close of the comment period. Obviously, it was entitled to a reasonable period of time to study and analyze the information, to seek further information where necessary, and to determine whether the statutory requirements for rulemaking on indoor air quality, including ETS, were satisfied."

OSHA also reminds the court that a new administration took office in January 1993, and that the post of

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Assistant Secretary remained vacant until the confirmation of Joseph Dear on November 8, 1993. "It is unreasonable to expect that significant priority-setting and resource-allocation decisions concerning the rulemaking could have been made without the participation of the Assistant Secretary." OSHA argues that the Occupational Safety and Health Act sets no time limits on pre-proposal activities, and grants the Secretary "broad discretion to determine whether to regulate particular hazards at all."

To counter ASH's claims that ETS should be regulated separately from IAQ, OSHA argues that the Secretary has allocated his budget resources to achieve optimum benefit by proposing to regulate IAQ and ETS in the same rulemaking. "Absent exigent circumstances of the most compelling sort, the agency's informed judgment as to the expected benefits of this approach should not be disturbed," OSHA states. The agency suggests that there is no need for the court to retain jurisdiction over the matter.

ASH's petition for review seeks an order that would require OSHA to institute a separate rulemaking regulating ETS in the workplace. OSHA's motion to dismiss was denied by the court in May 1993, and a mediator failed in an attempt to resolve the dispute through alternative dispute resolution in December 1993. *ASH v. Department of Labor*, No. 92-1661 (U.S. Court of Appeals, D.C. Circuit) (filed December 22, 1992).

[3] ASH Files Smoking Complaints with OSHA

In a recent newsletter, ASH reports that it has filed "several dozen of the strongest formal complaints of workplace smoking it has received with OSHA." This action follows the October 1993 solicitation of ASH supporters, to complete a preprinted OSHA complaint form with information about exposure to ETS in the workplace. Further details about the solicitation and a copy of the form appear in issue 58 of this Report, October 22, 1993.

ASH states that it decided to solicit the complaints, "after again receiving assurances from the agency that it does act upon indoor air quality complaints even if no specific standard is violated." Noting that OSHA does not yet have a workplace smoking standard in place, ASH says it is utilizing this latest strategy "to pressure OSHA into adopting such a rule as an alternative to

being forced to deal with and resolve thousands of complaints on an individual basis."

ASH asserts that processing the complaints it filed has "dramatically increased ASH's legal workload," and urges supporters to help ASH with immediate contributions. See *ASH Review*, November-December 1993.

[4] Kassebaum Offers Alternative OSHA Reform Legislation

On March 17, 1994, Senator Nancy Kassebaum (R-Kan.) introduced a second Republican version of OSHA reform legislation. Titled the "Occupational Safety and Health Reform Act" (S. 1950), the measure was referred to the Senate Committee on Labor and Human Resources. In addition to requiring the Secretary of Labor to conduct a "regulatory flexibility analysis" when promulgating new standards, the bill would require a "continuing comprehensive analysis of the costs and benefits of each standard in effect" under the Occupational Safety and Health Act of 1970. The bill would also provide incentives for employers to maintain safe workplaces and defenses to employers cited under the Act.

103D CONGRESS

[5] Subcommittee Vote on Waxman Bill Postponed

According to a press report, Representative Henry Waxman's (D-Cal.) "Smoke-Free Environment Act of 1993" (H.R. 3434), that was scheduled for a subcommittee vote on March 22, 1994, was pulled from the schedule to address concerns about the measure that were voiced by some panel members.

Press reports indicate Waxman pulled consideration of the bill because he did not have the votes required for passage by the committee. A new hearing date was not scheduled prior to the Easter adjournment that began on March 28. Congress is scheduled to resume its current session on April 8. Waxman's bill would restrict smoking to separately ventilated areas of nearly every nonresidential building in the United States. See *Chicago Tribune* and *The New York Times*, March 23, 1994.

[6] House Approves Education Bill With Durbin Amendment

On March 24, 1994, the House reportedly approved an education appropriations bill (H.R. 6) to which Representative Richard Durbin (D-Ill.) had successfully amended his H.R. 710 legislation. Durbin had originally offered a version of the bill that would have permitted smoking in separately-ventilated areas of buildings subject to the Act, the version ultimately approved in the House apparently imposes a complete ban on smoking instead, according to press reports.

Following passage of the bill, Durbin stated, "Today's House action means millions of American children will now be guaranteed a smoke-free environment. I encourage parents to do the same in their homes." See *St. Louis Post-Dispatch*, March 24, 1994.

[7] President Signs Education Bill with PRO-KIDS Amendment

On Thursday, March 31, 1994, President Bill Clinton signed into law Goals 2000: Educate America Act (H.R. 1804). The law will go into effect on July 1. When House and Senate conferees filed their final version on the bill on March 21, 1994, they reportedly did so without having removed Senator Frank Lautenberg's (D-N.J.) PRO-KIDS amendment (S. 261). The new law will restrict smoking to separately-ventilated areas of buildings where federally-funded services are provided to children under the age of 18.

In a prepared statement about the amendment, Senator Edward Kennedy (D-Mass.) stated, "This is a breath of fresh air for young people who deserve to be free from the dangers of secondhand smoke. Study after study shows that secondhand smoke poses significant health risks for children, aggravating illnesses such as bronchitis, pneumonia and asthma. With this action, Congress will affirm that classrooms, clinics and child-care centers must be smoke free." See *The Boston Globe*, March 22, 1994, and *The Kansas City Star*, April 1, 1994.

[8] Risk Assessment Language to be Added to House Bill

Representative John Mica (R-Fla.) is reportedly drafting an amendment to the House Clean Water Act

bill (H.R. 3948) that would require EPA to conduct risk assessments and cost-benefit analyses for all of its rulemakings. The amendment will apparently be similar to a provision Mica introduced that was barred from consideration during debate on a bill that would have elevated EPA to cabinet level status (H.R. 3425). Senator J. Bennett Johnston (D-La.) successfully attached an identical amendment to the Senate version of H.R. 3425, which was passed 95-3 (S. 171). See *Inside EPA*, March 25, 1994.

[9] Risk Assessment May be Added to Safe Drinking Water Act

According to a press report, Senator Daniel Patrick Moynihan (D-N.Y.) was poised to add an abbreviated version of his legislation, the "Environmental Risk Reduction Act of 1993" (S. 110) to the Safe Drinking Water Act (S. 1547). The measure would require EPA to rank environmental risks and conduct cost-benefit analyses. It was apparently unknown whether the requirements would be added as an amendment to the bill or would be incorporated during a rewrite in the Senate Environment & Public Works committee.

A draft of the Moynihan proposal would reportedly require EPA administrator to rank risks based on threats to human health, including sensitive subpopulations; public welfare; and ecological resources. The measure would also direct the administrator to identify the major uncertainties associated with those risks and determine what research might reduce such uncertainties. The Safe Drinking Water Act was reportedly scheduled to be marked up during the week of March 21, 1994. See *Inside EPA*, March 18, 1994.

**U.S. ENVIRONMENTAL PROTECTION
AGENCY (EPA)**

[10] EPA Day Care Center Shut Down for Ventilation Problems

According to a press report, EPA's Early Environments day care center, located in the Waterside Mall complex that has been plagued with IAQ problems, was closed briefly early in March 1994 when carbon monoxide readings from diesel exhaust fumes suddenly increased. The Waterside Mall complex is EPA's Washington, D.C. headquarters. Apparently, the agency started monitoring the air a month earlier due

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to concerns about odors in the center. Located above the mall's parking garage and near a tunnel used by delivery trucks, the center cares for the children of EPA employees, and has apparently had an ongoing problem with ventilation. See *The Washington Post*, March 15, 1994. The IAQ problems inside the Waterside Mall complex was the subject of the *Bahura* case. Five of the plaintiffs in that case were recently awarded damages by a jury in December 1993.

[11] Children's Group Urges Policymakers to Consider Health Effects on Children

The EPA was reportedly criticized during a press briefing that discussed setting standards for environmental hazards affecting children on the basis of data from adult humans and animals. The briefing was held on March 17, 1994, by the Children's Environmental Health Network. The group also reportedly urged policymakers to consider children's special vulnerability to environment-related illnesses. Among the alleged hazards to children cited by the group were ETS, lead, polychlorinated biphenyls, air pollution and nitrates in water. The Network, which is a national, multidisciplinary group focused on preventing children's exposures to environmental hazards, claims that children are more vulnerable to air pollution than adults. See *BNA Chemical Regulation Daily*, March 21, 1994.

[12] IAQ Study Launched by EPA

EPA is reportedly conducting an IAQ study involving approximately 200 "sick" and "healthy" buildings. The study, which is expected to take three to five years to complete, will examine how building design and heating, ventilation and air conditioning systems affect air quality. Researchers will interview building occupants and try to determine what substances are present in indoor air. The results will apparently be used to create a computer database that may serve as a baseline for further research. According to a spokesperson for the agency's Office of Radiation and Indoor Air, independent researchers are being asked to adopt EPA protocols and contribute to the database. See *The New York Times*, March 15, 1994.

STATE AND LOCAL GOVERNMENTS

[13] Amendments Cause Sponsor to Withdraw Support of Antismoking Bill

According to a press report, the sponsor of the bill that would ban smoking in workplaces in California (A.B. 13) has said the bill is no longer acceptable and has no chance of becoming law since it was amended recently in committee. One amendment would prevent local governments from enacting tougher restrictions on smoking. Another amendment, adopted in committee, that has also apparently caused the sponsor to withdraw his support, would permit restaurants to designate up to 25 percent of their seating areas for smoking if they comply with a ventilation standard. A.B. 13's sponsor, Assemblyman Terry Friedman, has reportedly vowed, "I will do everything in my power to fight these amendments."

The coalition of antismoking organizations that originally supported Friedman's measure is reportedly rethinking its position following the committee vote on March 22, 1994. According to a spokesperson for the California and Greater Los Angeles affiliates of the American Heart Association, that group has decided to oppose the amended bill. A lobbyist for the American Lung Association reportedly said, "This bill has just been raped. We will do everything possible to make sure it is killed." See *The San Diego Union-Tribune* and *Los Angeles Times*, March 24, 1994; *BNA California-Safety & Health Report*, March 28, 1994.

Meanwhile, on February 10, 1994, a bill that would request the Standards Board to convene an advisory committee to develop an indoor air quality standard was introduced in the California Legislature (ACR 90). The measure was reportedly referred to the Assembly Labor and Employment Committee on February 24, 1994.

[14] Los Angeles Orders Economic Impact Study

On March 22, 1994, the Los Angeles City Council reportedly voted to order a study on the economic impact of its restaurant smoking ban. The narrow 8-7 vote apparently followed the release of a private survey which reported that more than half of 300 restaurant owners said they had lost an average of \$11,113 a month because of the ban. The ban went into effect in August 1993. See *Los Angeles Times*, March 22 and 23, 1994.

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Meanwhile, on March 25, 1994, the city council reportedly voted unanimously in favor of a resolution urging residents not to sign petitions supporting statewide legislation that would preempt local regulation of smoking. Should the petition drive succeed in collecting 600,000 signatures by May 1, 1994, the measure will appear on the November ballot. The resolution passed by the Los Angeles City Council also reportedly declares the city's opposition to the initiative should it make it to the ballot. *See Business Wire*, March 25, 1994.

[15] Survey Shows Workplace Smoking Bans Cut Cigarette Consumption

A survey conducted with funds from California's Proposition 99 reportedly showed that workplace smoking bans cut cigarette consumption by 26 percent. The report, which was scheduled to be officially released on March 23, 1994, was apparently authored by the director of the cancer prevention program at the University of California, San Diego. Antismoking activist Stanton Glantz reportedly served as a scientific reviewer of the survey and provided an advance copy of the document to the *Associated Press*. According to a press report, the survey also indicated that nearly half of Californians have banned smoking in their homes. *See Associated Press*, March 21 & 23, 1994; *The Plain Dealer*, March 24, 1994.

[16] New York City Proposes Restrictions on Smoking

According to a press report, the leadership of the City Council in New York City announced on March 16, 1994, that it would seek new restrictions on smoking in public places. Specifically, the proposal would restrict smoking in public places to separately ventilated rooms. Public places without separately ventilated rooms would be forced to prohibit smoking. New York City already has legislation, adopted in 1988, that requires designated nonsmoking areas in restaurants and other public places and that limits smoking in the workplace.

Mayor Rudolph Giuliani reportedly endorsed the concept of broad restrictions on smoking in public places, but he did not specifically endorse the proposal, saying he had not yet reviewed it. The smoking restrictions would apparently apply to such places as pool halls, outdoor cafes, outdoor areas of child-care

agencies, the seats at outdoor sports arenas such as Shea and Yankee Stadiums, and most restaurants and offices. Exemptions would be made for restaurants with fewer than 50 seats, and nightclubs and bars not attached to public areas in restaurants or hotels.

The president of the New York State Restaurant Association apparently criticized the measure, saying, "This bill is going to cause quite a few problems. It would be costly, and we think it would be difficult to deal with." The general manager of the Four Seasons reportedly said, "We're in the hospitality business. We shouldn't be in the policing business. Smokers and nonsmokers are our customers." According to the executive director of the United Restaurant, Hotel and Tavern Association of New York State, "We don't think you need laws like this. The public is capable of choosing to frequent establishments based on their policies." *See The New York Times*, March 17, 1994; *United Press International*, March 16, 1994.

Meanwhile, several antismoking organizations in New York are reportedly challenging state laws that permit smoking in designated areas. According to a press report, the New York Public Interest Research Group, the Boys Club, and the League of Women Voters are part of a coalition that has launched the "Smoke-Free New York Campaign," which is seeking to ban smoking in restaurants, hospitals and the workplace. *See Parenting*, March 17, 1994.

[17] St. Louis Suburb Rejects Smoking Proposal

The city of Webster Groves, Missouri, recently considered and rejected a proposed ordinance that would have banned smoking in private homes while children under age 17 were present. The proposal had apparently been recommended by the city's public safety advisory board. In rejecting the proposal, the City Manager was quoted in a press report as saying, "We're not going to touch private residences." *See St. Louis Post-Dispatch*, March 14, 1994.

In January 1993, legislation that would have prohibited smoking in private vehicles where passengers under age 16 are present was introduced in the Washington state legislature. (H.B. 1114, 53d leg. - Reg. Sess. 1993) Passage of that legislation failed.

ETS-RELATED LITIGATION AGAINST CIGARETTE MANUFACTURERS

[18] *Bluitt*: Deposition of Plaintiff Alfred Bluitt Scheduled

Defendants have noticed the deposition of plaintiff Alfred Bluitt for April 13, 1994.

Plaintiffs in this action allege Willie Ruth Bluitt was a nonsmoker who died of lung cancer as a result of workplace exposure to environmental tobacco smoke. Defendants in the action are the six major U.S. cigarette manufacturers. *Bluitt v. R.J. Reynolds Tobacco Co., et al.* (U.S. District Court, Northern District, Texas) (filed August 30, 1993).

[19] *Broin*: Defendants' Motion for Extension of Time Granted; More Tobacco Executives' Depositions to be Taken

On March 24, 1994, the Third District of the Court of Appeal of Florida granted the defendants' motion for extension of time to seek rehearing or certification to the Florida Supreme Court from the March 15 decision that reversed the trial court's 1992 ruling dismissing plaintiffs' class action allegations. Due to the extension of time, defendants' motion or motions are to be filed by April 18.

Depositions of four more tobacco industry executives have been scheduled. Robert Gertenbach, formerly an executive with the Council for Tobacco Research, will be deposed on April 6. Horace Kornegay, a former executive of The Tobacco Institute; Dr. Alexander Spears of Lorillard; and James Johnston of R.J. Reynolds are to be deposed April 25-27.

Plaintiffs noticed depositions for April 20 of two American Tobacco executives, Charles Mullen and William Moore, but the deposition dates have not yet been confirmed. Plaintiffs also noticed the deposition of Dr. William Cahan of New York City's Sloan Kettering Hospital for April 13. Dr. Cahan has not been associated with this lawsuit.

The March 29 hearing on the renewed motion of Loews Corporation to dismiss plaintiffs' second amended complaint was postponed. A new hearing date of April 21 was set. Loews Corporation's motion to dismiss is based on the court's lack of personal jurisdiction.

At issue in this case are the claims of 28 flight attendants allegedly injured by occupational exposure to ETS. In addition, the husband of one of the flight attendants claims loss of consortium. The 28 attendants purport to represent a class of approximately 60,000 other attendants.

Injuries alleged by the putative class representatives include lung cancer, breast cancer and unspecified respiratory ailments. Plaintiffs further allege that occupational exposure to ETS on board aircraft causes at least 22 diseases and a reasonable fear of contracting such diseases. The defendants are the six major U.S. cigarette manufacturers (plus related entities), UST, Inc., United States Tobacco Company, Dosal Tobacco Corp., the Council for Tobacco Research, The Tobacco Institute, and three trade associations. *Broin, et al., v. Philip Morris, et al.* (Circuit Court, Dade County, Florida) (filed October 31, 1991).

[20] *Butler*: Pre-trial Deadlines Modified; Depositions of Plaintiffs' Expert Witnesses to be Rescheduled

At the March 18, 1994, hearing on a number of pending discovery disputes, the court extended several pretrial deadlines. The new deadlines include May 27 for defendants to designate their expert witnesses and July 8 for the close of discovery. The trial date in *Butler* was not changed; trial is still scheduled to begin on September 6, 1994.

The court did not rule on plaintiffs' motion for protective order as to the deposition notices defendants served on plaintiffs' expert witnesses. Instead, he ordered that defendants complete the depositions of plaintiffs' experts by May 9. The depositions of plaintiffs' expert witnesses that were scheduled to begin on March 22 and continue through April 6 were postponed. New dates for the depositions have not been set.

Plaintiffs contend that Burl Butler, a barber from Laurel, Mississippi, developed lung cancer as a result of his exposure to environmental tobacco smoke. The defendants in this case consist of the six major U.S. cigarette manufacturers and several local retailers. *Butler v. R.J. Reynolds Tobacco Company, et al.* (Circuit Court, Hinds County, Mississippi) (filed October 21, 1992).

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[21] *Dunn*: Reply Brief Filed in Appeal by the Non-Manufacturing Tobacco Company Defendants

On March 14, 1994, the non-manufacturing tobacco company defendants (American Brands, Liggett & Myers, Loews Corporation and RJR Nabisco Holdings Corporation) filed with the Indiana Court of Appeals a reply brief in support of their petition for permission to file an interlocutory appeal and for a partial stay of proceedings pending appeal. In their petition, the defendants contend the trial court erred in its ruling of December 29, 1993, denying their motions to dismiss based on the court's lack of jurisdiction.

Plaintiffs in this case contend that Mildred Wiley was a nonsmoker who died of lung cancer as a result of workplace exposure to environmental tobacco smoke. Her husband, Philip Wiley, is also asserting a loss of consortium claim. Defendants in the case are each of the six major U.S. cigarette manufacturers, parent companies of three of the manufacturers, The Tobacco Institute, and the Council for Tobacco Research. *Dunn v. RJR Nabisco Holdings Corporation, et al.* (Superior Court, Delaware County, Indiana) (filed May 28, 1993).

ETS/IAQ LITIGATION NOT INVOLVING CIGARETTE MANUFACTURERS

AMERICANS WITH DISABILITIES ACT (ADA)

- [22] *Staron v. McDonald's Corp.; Staron v. Burger King Corp.*, Nos. 93-CV-665, -667 (U.S. District Court, Connecticut) (filed March 30, 1993; cases closed March 11, 1994); *Staron v. Wendy's Old Fashioned Hamburgers of New York, Inc.*, No. 93-CV-666 (U.S. District Court, Connecticut) (filed March 30, 1993; stipulation of dismissal filed March 25, 1994)

On March 11, 1994, judgment was entered against the plaintiffs who had sought to force McDonald's and Burger King to ban smoking in their restaurants as an accommodation of their purported ETS-related disabilities under the ADA. The U.S. District judge assigned to the cases approved and adopted the ruling of the magistrate judge who had recommended that the defendants' motions to dismiss be granted. Further

details about the magistrate's recommended ruling appeared in issue 65 of this Report, February 5, 1994.

In light of the disposition of the cases against McDonald's and Burger King, the judge in the case filed against Wendy's denied a joint motion to continue to file pretrial memoranda, and the parties in that case, on March 25, 1994, filed a stipulation of dismissal without prejudice.

According to a press report, the attorney representing the plaintiffs, Connecticut antismoking advocate and legislator Robert Farr, said he would appeal the decisions. As of March 29, 1994, no appeals had been filed. See *The Wall Street Journal*, March 16, 1994.

WORKPLACE: DISABILITY PENSION BENEFITS

- [23] *Pagan v. The NYNEX Pension Plan*, 1994 U.S. Dist. LEXIS 2862 (U.S. District Court, Southern District, New York) (decided March 4, 1994)

A U.S. District Court has determined that an employee was properly terminated from receiving disability benefits for an alleged allergic reaction to ETS. Employee Gloria Pagan received disability benefits under a private pension plan for a limited period after allegedly suffering an allergic reaction to ETS and ceasing to work. The plan determined that she could return to work before the expiration of the 52-week period of disability benefits necessary for a disability pension under the plan. When Pagan did not return to work, she was terminated.

Pagan was evidently able to secure rulings of disability from state workers' compensation authorities and the Social Security Administration, then claimed that these rulings triggered the otherwise unauthorized liability of the private pension plan to pay her disability pension benefits. The court disagreed, finding that neither workers' compensation definitions of disability nor Social Security determinations are binding on private pension plans under ERISA.

The court also found that the plan did not arbitrarily terminate benefits because Pagan's treating physician said that the effects of the reaction to ETS were not permanent, and Pagan could return to work in a smoke-free environment.

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WORKPLACE: OFF DUTY SMOKING BAN

- [24] *Rossborough v. Plymouth* (Massachusetts Civil Service Commission) (heard March 14, 1994)

According to a press report, a woman who was fired under a law that prohibits police officers hired after 1988 from smoking on or off the job was scheduled to challenge the termination before the Civil Service Commission on March 14, 1994. Police officer Lynne Rossborough reportedly admitted smoking a cigarette, but the union which is backing her appeal claims there should have been "a little more leeway with her, a little more common sense." Rossborough's brother, who is also a police officer, apparently claims that she was fired because of his troubled relationship with the town's police chief. The case is reportedly the first test of Massachusetts' strict antismoking law. See *Boston Globe*, March 14, 1994.

WORKPLACE: COLLECTIVE BARGAINING

- [25] *Matter of Department of the Navy, Philadelphia Naval Shipyard, and Local F-61, International Association of Firefighters, AFL-CIO*, 1994 WL 52762 (Federal Service Impasses Panel) (decided February 7, 1994)

A Federal Service Impasses Panel has resolved a smoking policy dispute between the Navy and a union representing firefighters and fire inspectors at the Philadelphia Naval Shipyard by banning smoking indoors and by ordering the employer to provide a reasonably accessible and sheltered outdoor smoking area for smoking employees, along with free smoking cessation classes. The union had sought a policy that would have permitted smoking in a vestibule to the building, while the employer proposed that the designated smoking area be located in another building. The panel rejected both proposals, saying they ignored "the overwhelming scientific evidence regarding the hazards connected with exposure to environmental tobacco smoke."

- [26] *Matter of Newark Valley Central School District v. Public Employment Relations Board, et al.*, 1994 U.S. N.Y. LEXIS 281 (New York Court of Appeals) (decided March 24, 1994)

The New York Court of Appeals has determined that a school district's unilateral implementation of a smoking

ban on school buses when no students are on board should have been collectively bargained as a term or condition of employment. In so ruling, the court rejected the district's argument that collective bargaining on the issue was preempted by statute or policy. The court refused to reach the issue regarding whether "smoking drivers do or do not present a health hazard to students who later board the bus," as the issue was not presented during initial stages of the case.

- [27] *Matter of Department of Veterans Affairs Regional Office, St. Petersburg, Florida and Local 1594, American Federation of Government Employees, AFL-CIO*, 1994 WL 66831 (Federal Service Impasses Panel) (decided March 2, 1994)

A Federal Service Impasses Panel has ordered that smoking be prohibited indoors at a VA office in St. Petersburg, Florida. The ruling adopts the employer's recommended resolution of a bargaining impasse, and further imposes the obligation upon the employer to provide a reasonably accessible, sheltered outdoor area for smokers and smoking cessation classes at no cost to employees. The employer, in making its recommendation, had cited the EPA Risk Assessment on ETS to support its claim that "sidestream and second-hand smoke are health hazards."

The union had sought the establishment of a designated smoking room in an existing lounge that had a window and could provide direct exhaust to the outside. The union also proposed repairing a portable smoke filtration system and keeping doors to the smoking area closed. In this regard, the panel stated, "The improvements [the union] proposes do not, in our view, go far enough to separate employees from smoke-laden air in light of scientific evidence that links the passive inhalation of second-hand smoke to disease processes."

- [28] *Luke Air Force Base, Arizona v. American Federation of Government Employees, Local 1547, AFL-CIO*, 1994 WL 58823 (Federal Labor Relations Authority) (decided February 24, 1994)

The Federal Labor Relations Authority has ordered the employer to rescind its unilaterally imposed nonsmoking policy and to permit smoking indoors. The ruling affirmed a decision of an administrative law

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judge. In May 1988, the employer implemented a base-wide nonsmoking policy without bargaining with the union over the substance, impact and implementation of the change. Smoking occurred in a number of buildings on the base until 1990, when the employer insisted that the policy be complied with. Thereafter, the union filed an unfair labor practices complaint. Citing a number of cases in which employers were required to engage in bargaining over smoking policies, the judge rejected the employer's argument that bargaining may be dispensed with in light of "the widely accepted physical hazards of tobacco smoke."

LEGAL ISSUES AND DEVELOPMENTS

[29] "Indoor Environment '94 Conference and Exhibition, 'New Challenges, New Opportunities,'" Washington, D.C., March 22-25, 1994

Sponsored by IAQ Publications, Inc, this four-day seminar was divided into more than 40 programs. Tracks included: Programs and Policy; Issues in IAQ Evaluation and Mitigation; Building Management; Safety and Health; and Litigation and Liability. Presentations of interest included the following:

OSHA. Chuck Adkins, OSHA's Director of Health Standards, gave a general overview of OSHA's activities and discussed at length the history of ASH litigation against OSHA. His session was held prior to OSHA's March 25 announcement concerning rulemaking on indoor air quality and indoor smoking. Adkins said that the OSHA rulemaking process with respect to indoor air and ETS is likely to take at least another one and a half to two years. Although he indicated a proposal from OSHA was imminent, he did not reveal what OSHA would propose. In light of the impending announcement and an apparent OSHA decision not to leak any information, a scheduled OSHA update session was cancelled.

EPA. Both Robert Axelrad, Director of the Indoor Air Division, and Elissa Feldman, EPA Deputy Director, gave presentations on EPA activities regarding indoor air. With respect to ETS, both indicated that it was a priority at the agency. They indicated EPA is continuing to distribute its brochure entitled "Secondhand Tobacco Smoke," and said the American

Lung Association (ALA) is revising the brochure for distribution to a lower socioeconomic audience. In addition, ALA reportedly is preparing versions in languages other than English. Both Axelrad and Feldman stated that EPA testified in support of Representative Henry Waxman's bill (H.R. 3434) to ban smoking in most public places and that the bill is supported by the Clinton Administration. They also indicated that ETS is likely to be addressed in OSHA's expected proposal on indoor air. Axelrad stated that EPA did not intend to revisit the ETS Risk Assessment unless a significant new study was reported.

ASH. John Banzhaf summarized what he characterized as significant developments with respect to ASH's activities. He said ASH was instrumental in getting lawsuits filed against some fast-food restaurants to eliminate smoking. He also noted that a number of the restaurants had now implemented smoking bans. Banzhaf also discussed new legal theories that he said ASH would push in its effort to eliminate smoking in the future. For example, he said owners of buildings that allow smoking should be found negligent if smoking-related fires occurred because of a changing industry standard. He also said four recent court rulings found that allowing ETS exposure amounted to "battery" which could be used to circumvent workers' compensation and provide claims for punitive damages.

National Restaurant Association. Robert Harrington of the National Restaurant Association described his organization's views regarding smoking, saying that regulation is not desired. He said the decision should be left to the market, allowing restaurant owners and their customers to decide. He said the association could not condone recent attempts to go after high profile segments of the industry, such as fast-food chains. He said recent surveys showed that 25 percent of customers would not patronize restaurants that banned smoking, while some 75 percent would seek out smoke-free restaurants. He said if smoking regulations are adopted, the association wanted them to be implemented consistently across the board.

BOMA. Michael Jawer, Director, and Jim Dinegar, Vice President, said that BOMA supports a ban on smoking in the workplace and that a BOMA representative had recently testified in support of Waxman's bill. Jawer stated that BOMA does not support

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separately-ventilated smoking rooms as they: (i) encourage smoking; (ii) might still allow ETS into the workplace; and (iii) create a fire risk.

Representative Kennedy. Representative Joseph Kennedy (D-Mass.), the designated keynote speaker, discussed his IAQ bill currently pending in the 103d Congress (H.R. 2919). He said he feels it is time to do more about IAQ than research. He said he expects further action on the bill in the near future and feels it will pass if the public gets behind it. Kennedy's measure, entitled the "Indoor Air Act of 1993," would give EPA regulatory authority over indoor air and would require EPA to disseminate public health advisories about "indoor air pollutants." There has been no congressional activity on the bill since November 1993, when the measure was given a hearing before a House committee.

Plaintiff's Attorneys. Robert Katz, Mark Diamond and Ronald Simon gave presentations about indoor air quality litigation from the plaintiff's perspective. Katz, who represented the plaintiffs in the *Bahura* Waterside Mall case involving EPA's Washington, D.C., headquarters, described the circumstances and strategies involved in the litigation. He as well as the other attorneys said that the absence of clear, identifiable injuries will present problems for plaintiffs in the future. Opinion was mixed as to whether there will be a wave of such litigation. Some said the costs of litigation for plaintiffs will be too high to encourage an increase in litigation activity. Others said the *Bahura* verdict in favor of plaintiffs could pave the way for more litigation. See issue 64 of this Report, January 21, 1994, for further details on the *Bahura* verdict.

Defense Attorneys. James Moran and Marc Gaffney of New Jersey, and Victor Schwartz of Washington, D.C., discussed the defense of indoor air cases. Moran and Gaffney said breach of contract, negligence, and product liability were often used by plaintiffs. They said defendants should consider impleading other defendants if suits arise. Mr. Schwartz discussed smoking and health and ETS cases, emphasizing the difficulty plaintiffs have had winning such cases. He said that causation is one issue that ETS plaintiffs will have a difficult time proving.

Other Presentations. John Fox, an attorney from Palo Alto, California, discussed litigation involving smoking

in the workplace. He said that nonsmokers have had very limited success suing employers for harm caused by smoking in the workplace. He discussed various legal theories tried by plaintiffs, but rejected by the courts, including constitutional claims and workers' compensation cases. Mr. Fox said he does not believe such litigation will be more successful in the future and said the EPA Risk Assessment on ETS would help plaintiffs little because of its "flaws."

Maurice LeVois of Environmental Health Resources in Tiburon, California, criticized the science in the EPA Risk Assessment on ETS. He said the relative risk found in the risk assessment was too small to support a causal inference. He said EPA had been inconsistent in its treatment of EMF and ETS. He said EPA classified evidence of risk of cancer from EMF as being inconclusive even though the reported risk was higher than that reported for ETS. Mr. LeVois also said there was a serious misclassification problem associated with the risk assessment.

Edward Chu, formerly a project manager at ICF, Inc., and now at the U.S. Postal Commission, presented findings from his study on the loss of productivity associated with smoking bans at the workplace. He used questionnaires to try to determine whether smokers took more breaktime than nonsmokers because they were forced to leave the building to smoke. Although the methodology was questionable, he concluded that smokers took longer breaks. From this, he raised the issue of whether it would be more cost effective for an employer to provide smoking rooms in general and smoking rooms equipped with computers in particular.

[30] "Smoking in the Workplace: Developing a Policy that Works for your Company," L. Lynne Pulliam, 19 *Employee Relations L. J.* 279 (1993-94)

In this article an associate with the Paul, Hastings firm discusses basic practical and legal considerations that she advises employers to review when implementing a workplace smoking policy.

The practical considerations include an outline of a procedure to follow in developing a smoking policy and a list of "common restrictions adopted by employers," which are said to include the following:

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1. Allowing employees to smoke only on breaks or at lunch;
2. Staggering the break times of smokers and nonsmokers "in order to reduce the environmental smoke suffered by nonsmokers";
3. Segregating smokers from nonsmokers, using existing physical barriers or ventilation and filtration;
4. Restricting smoking to specific areas; and
5. Permitting job transfers or other accommodations for smoke-sensitive employees.

According to the author, these options "are more flexible than outright bans on smoking and accordingly may suit the preferences of a greater percentage of employees."

With respect to legal considerations, the article advises employers to "carefully review local and state laws." It describes the provisions of selected statutes. Only a handful of cases are discussed.

OTHER DEVELOPMENTS

[31] AMA Launches Antismoking Campaign

The American Medical Association (AMA) has reportedly announced its plan to launch an antismoking multi-media campaign beginning March 31, 1994. The campaign will consist of 30-minute "infomercials" that will air on hundreds of television channels nationwide. Along with the "infomercials," the AMA says it plans to use booklets, video and audio tapes, billboards and a 24-hour telephone hotline.

An AMA spokesperson was quoted in a recent press article to say, "The AMA has not been in the forefront in supporting federal, state or local efforts to restrict smoking," and that the group has recently stepped up its lobbying efforts. *See Chicago Tribune*, March 31, 1994.

[32] More Fast Food Restaurants Ban Smoking in Texas

Jack-in-the-Box fast-food restaurants in Texas have apparently adopted a smoking ban, effective on

March 15, 1994. According to Texas Attorney General Dan Morales, who last month filed suit against several fast-food restaurants claiming that they deceive customers in designating nonsmoking sections without separate ventilation, Jack-in-the-Box joins Arby's, Dairy Queen, McDonald's and Taco Bell in banning smoking on the premises. An area manager for Jack-in-the-Box reportedly said that the chain began planning the policy a year ago and will expand the smoking ban to the remaining 758 company-owned restaurants and 60 percent of the franchises nationwide beginning April 15, 1994.

Morales is apparently negotiating with other fast-food restaurants not named in the lawsuits to either ban smoking or to install separate ventilation to protect nonsmoking customers from ETS. The suits Morales filed against McDonald's and Taco Bell have been dropped. Further details about the lawsuits appear in issues 66 and 67 of this Report, February 18 and March 4, 1994. According to a press report, several of the restaurant chains in Texas are fighting the lawsuit; Long John Silvers is reportedly gathering customer comments through a toll-free telephone number. *See Houston Chronicle*, March 16, 1994.

[33] ASH Tries to Raise Funds While Seeking to Expand Airline Smoking Bans

ASH has sent a letter to its supporters indicating that it is launching a "five step offensive" to force airlines to provide smoke-free flights to any destination. The steps are as follows: (i) ASH claims to have written to major carriers warning them of the legal risks of exposing passengers, especially children, to ETS on international flights; (ii) ASH will file a petition with the Department of Transportation seeking agreements banning smoking on all flights in the Western Hemisphere; (iii) ASH will request that the nation's attorneys general initiate some action against airlines that expose passengers, especially children, to ETS; (iv) ASH is preparing a letter for those who provide it with contributions explaining what the law requires U.S. carriers to do on overseas flights to protect passengers from ETS; and (v) ASH will provide information in its letter on how supporters can receive compensation in the form of free or reduced fare flights if U.S. carriers fail to protect them from drifting ETS.

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[34] **Salvation Army Bans Smoking in its Anaheim Rehabilitation Center**

The Salvation Army in Anaheim, California, has reportedly announced plans to ban smoking in its rehabilitation center beginning on April 1, 1994. The center helps people break alcohol and drug addictions, and its spokesperson was quoted in a recent press report as saying that, "In reality, the number of deaths from tobacco and secondhand smoke far outweighs alcohol and drug-related fatalities." See *Los Angeles Times*, March 20, 1994.

MEDIA COVERAGE

[35] **USA Today/CNN Poll Shows Most Want Accommodation**

According to the reported results of a *USA Today/CNN* Gallup survey, less than 40 percent of those responding said they thought smoking should be banned in workplaces and restaurants. Twenty percent said smoking should be prohibited in hotels. The poll was conducted by telephone and surveyed 1,007 adults. See *USA Today*, March 16, 1994.

[36] **"Becoming a Land of the Smoke-Free, Ban by Ban," C.S. Manegold, *The New York Times*, March 22, 1994**

This article discusses measures that are being taken nationwide to impose bans or restrictions on smoking. The author notes that smoking regulations were first introduced in the early 1960s and range from partial bans in restaurants to total bans in workplaces, public places and government buildings. The article reviews the antismoking measures pending in Congress and provides a chart which highlights actions taken recently by the Department of Defense, fast-food restaurants, and selected cities and states.

SCIENTIFIC/TECHNICAL ITEMS

LUNG CANCER

- [37] "Cancer Incidence Among Waitresses in Norway," K. Kjaerheim and A. Andersen, *Cancer Causes and Control* 5: 31-37, 1994 [See Appendix A]

The authors of this study report analyses of cancer incidence in a cohort of Norwegian waitresses. They propose alcohol consumption, smoking, and ETS exposure as possible explanations for the "excess" of certain cancers that they calculated. See issue 59 of this Report, November 5, 1993, for a similar publication by these authors that focuses on males.

RESPIRATORY DISEASES AND CONDITIONS -- CHILDREN

- [38] "The Effect of Genetic and Environmental Factors on the Prevalence of Allergic Disorders at the Age of Two Years," S.H. Arshad, M. Stevens, and D.W. Hide, *Clinical and Experimental Allergy* 23: 504-511, 1993 [See Appendix A]

The authors of this study report that family history, male gender, low birth weight, maternal smoking, and season of birth were statistically significant risk factors for asthma in 275 allergic children from the Isle of Wight.

- [39] "Passive Smoking Effects on Wheezy Bronchitis," A. Bener, A. Al-Frayh, F. Ozkaragoz, and T.Q. Al-Jawadi, *Annals of Saudi Medicine* 13: 222-225, 1993 [See Appendix A]

The authors of this study conclude that "passive smoking" was statistically significantly associated with the frequency of attacks of wheezing in the Saudi children studied.

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OTHER HEALTH ISSUES

- [40] "Effects of Exposure to Smoke on Folate Status," F.L. Kaufman, E.B. Gold, and M.B. Schenker, *American Journal of Epidemiology* 138: 659, 1993 [See Appendix A]

This abstract, presented at a scientific meeting, discusses a comparison of folate levels among smoking, nonsmoking, and ETS-exposed women. (Folate supplements have been reported to reduce the incidence of some birth defects.) Reportedly, folate level was lowest in active smokers, intermediate in "passive smokers," and highest among nonsmokers.

- [41] "Otitis Media in Children: Frequency, Risk Factors, and Research Avenues," C. Infante-Rivard and A. Fernandez, *Epidemiologic Reviews* 15: 444-465, 1993 [See Appendix A]

The Canadian authors of this major review paper conclude that the claim that parental smoking is associated with otitis media in children "remains controversial," and call for better-designed epidemiologic studies to address this issue.

- [42] "Passive Smoking and Otitis Media with Effusion in Children," J.M. Rowe-Jones and M.J. Brockbank, *Journal of Laryngology and Otology* 107: 1181, 1993 [See Appendix A]

The authors of this abstract report no association between parental smoking and the risk of otitis media with effusion in their study of 100 otitis cases and 63 controls.

- [43] "Influence of Maternal Smoking, Paternal Smoking, and Involuntary Maternal Smoke Exposures on Oral Cleft Defects," G.M. Shaw and C.R. Wasserman, *American Journal of Epidemiology* 138: 596 [See Appendix A]

This abstract reports elevated and sometimes statistically significant risk estimates for cleft lip/cleft palate for maternal and paternal smoking prior to and during the first months of pregnancy. Maternal ETS exposure at the workplace was also reportedly associated with a statistically significant risk of this birth defect.

IN EUROPE & AROUND
THE WORLDREGULATORY AND LEGISLATIVE
MATTERS

ISRAEL

- [44] Rabin Refuses to Sign Antismoking Bill

As reportedly threatened, Prime Minister and acting Health Minister Yitzhak Rabin refused to sign into law an amendment that would limit smoking in the workplace to designated areas. Rabin's bureau chief was reported to have said Rabin would not sign the amendment because "he is a very heavy smoker and says it is hypocritical for someone like himself to sign such a bill."

The measure was to have gone into effect 90 days following Rabin's signature. Health Ministry officials say they are resigned to wait for a permanent Health Minister to be appointed before expecting a signature. Further details appear in issue 67 of this Report, March 4, 1994. See *The Jerusalem Post*, March 16, 1994.

NORWAY

- [45] Health Official Proposes Smoking Restrictions

Health Minister Werner Christie has reportedly proposed legislation that would require restaurants, bars and nightclubs to designate nonsmoking areas. The designated areas, as proposed, will be required to be equal in size to smoking areas, or else smoking must be banned. See *Aftenposten*, March 25, 1994.

ETS-RELATED LITIGATION INVOLVING
THE TOBACCO INDUSTRY

AUSTRALIA

- [46] *Tobacco Institute of Australia Limited v. National Health and Medical Research Council* (Federal Court, Sydney District Registry, General Division) (filed January 21, 1994)

On March 18, 1994, the Tobacco Institute of Australia (TIA) settled the proceedings it had brought

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against the National Health and Medical Research Council (NHMRC) concerning NHMRC's ongoing review of its 1986 report on ETS, entitled "Effects of Passive Smoking on Health." TIA had alleged that NHMRC had improperly framed the terms of reference for its review and had denied TIA an opportunity for a fair hearing as an interested party in the review process. Further details about TIA's application for an order of review against NHMRC appear in issue 65 of this Report, February 5, 1994.

NHMRC has, in response to the legal proceedings initiated by TIA, redrafted the terms of reference and published a notice that it will comply with the consultation provisions of the NHMRC Act. Accordingly, a broader range of evidence on ETS will now be considered by NHMRC in updating its report, and TIA and others will be given the opportunity to provide information and consult with the agency in its review process.

OTHER DEVELOPMENTS

DENMARK

[47] Day Care Workers Prohibited Around Children

Personnel in Aalborg day care centers could reportedly lose their jobs if they smoke while in the same room with children. Denmark's Ministry of Social Affairs and Health is said to be actively advocating smoking bans in day care facilities. Day care workers will reportedly be warned after a first offense and fired following a second violation of the policy. *See Jyllands-Posten*, March 25, 1994.

NORWAY

[48] Companies Go Smoke Free

Press reports from Norway indicate a number of workplaces there are imposing smoking bans. Among them are Conoco, Sunndel Malallverk, Amoco, Karmoy Fabrikker and Hoyanger Verk. Local trade unions reportedly say the bans are extreme and have called for "counter-action." *See Bergens Tidene*, March 19, 1994.

UNITED KINGDOM

[49] Glasgow 2000 Publishes Workplace Smoking Policy Guide

A new guide to help employers develop and implement smoking accommodation policies for the workplace has recently been published by Glasgow 2000. The guide entitled, "Workplace Smoking Policies. A Guide to Clearing the Air," is said to stress that smoking policies should take into account the needs of both smokers and nonsmokers.

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